U.S. Department of Labor

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Issue Date: 21 August 2008

Case No.: 2005-AIR-00027

In the Matter of

TIMOTHY A. CLARK
Complainant

v.

AIRBORNE, INC.,
d/b/a FIRST FLIGHT MANAGEMENT, LLC
Respondent

DECISION AND ORDER ON REMAND

This matter involves a complaint under the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR21" or "the Act"), as implemented by 29 C.F.R. part 1979. The Complainant filed a complaint against his former employer alleging that he was terminated from employment (that is, laid off) in violation of the Act.

After a hearing, held in October 2005, Administrative Law Judge ("ALJ") Teitler issued a Decision and Order denying relief to the Complainant. ALJ Teitler found the Complainant had failed to establish, by a preponderance of evidence, that his employment was terminated "due to his protected activity." Teitler Decision and Order ("D&O") at 9. ALJ Teitler also found that, even assuming arguendo the Complainant met this burden, the Respondent's evidence "meets the clear and convincing evidence standard to prove it would have terminated Complainant's employment regardless of his protected activity." D&O at 9-10.

The Complainant appealed. On March 31, 2008 the Administrative Review Board ("Board") remanded the matter, because ALJ Teitler used the inappropriate standard to determine the nexus, if any, between the Complainant's protected activity and his termination. The Board noted: "AIR 21 requires that a whistleblower like Clark prove by a preponderance of evidence that his protected activity was a 'contributing factor' in the adverse action taken against him. A 'contributing factor' is 'any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision'." (emphasis in original).(Board Order of Remand at 2). The Board also noted that ALJ Teitler's alternative finding, that the Respondent had established by clear and convincing evidence that it would have terminated the Complainant regardless of his protected activity, was inadequate, because ALJ Teitler did not specify any rationale or authority for this conclusion. Board Order of Remand at 2-3.

Administrative Law Judge Teitler died on May 10, 2007. Consequently, upon the Board's remand, this matter was reassigned to me. By Order dated April 16, 2008, District Chief Administrative Law Judge Robert D. Kaplan informed the parties of ALJ Teitler's death and my assignment to this case, and provided them the opportunity to object. No party objected. By Order dated April 23, 2008, I informed the parties that any matters to be submitted for my consideration must be filed within 45 days. Neither party submitted any additional matters.

Upon remand, I have considered all of the matters previously submitted in this case, including the record of the hearing before ALJ Teitler and the exhibits admitted into evidence. I also have considered the filings the parties submitted to ALJ Teitler after the hearing, as well as the matters the parties submitted to the Board on appeal.[1]

The Complainant's Protected Activity

Administrative Law Judge Teitler found the Complainant's protected activity consisted of three memoranda he submitted to management in February and March 2004. D&O at 7-8. All of these memorandums related to overdue maintenance on a specific aircraft, a Gulfstream IV, the Employer operated out of a hangar in Palm Beach, Florida. Hearing Transcript ("T.") at 65. The Complainant submitted the first two memoranda to the Director of Maintenance, with copies to several other officials, including the company President, in February 2004. T. at 84; Exhibits TAC-12; TAC-17.[2] The Complainant addressed the third memorandum only to the Director of Maintenance, and put it in the Director's internal office mailbox on March 5, 2004. T at 90; TAC-2. The Complainant was laid off on March 5, 2004, about an hour after placing the third memorandum in the Director's mailbox. T. at 91; TAC-1.

The Employer's Rationale for Terminating the Complainant's Employment

As ALJ Teitler noted, that the Employer's financial stability was precarious in 2004. D&O at 9. On December 30, 2003, the President sent a memorandum to all company personnel in which he outlined the company's position and discussed its future. Exhibit RX-7.[3] As ALJ Teitler found, the letter was "optimistic." D&O at 5. In addition, however, the memorandum candidly acknowledged the company's shortcomings, noting that employees have not received bonuses, a profit-sharing plan, or salary increases. The memorandum also addressed short-term challenges, stating: "The benefits of a near-term increase in sales are not immediate. In fact [,] over the next 4-6 months we will face a new set of challenges. In order to support the anticipated additional activity, investments in personnel and materials are required. Cash requirements to support the additional flying will increase faster than revenue is realized…."

[1] In particular, I have considered the assertions the Complainant made in his Memorandum of Law and Reply Memorandum of Law.

[2] At the hearing, many of the Complainant's Exhibits were denominated "TAC," followed by the Exhibit Number.

[3] At the hearing, the Employer's Exhibits were denominated "RX," followed by the Exhibit Number.

At the hearing, Ms. Kathleen Biggio, the Employer's Vice President of Administration, who was the company human resources chief in 2004, testified that the company lost several million dollars between 2001 and 2005. T. at 225. She also stated that, in early 2004, the company learned one of the planes it operated was to be sold by its owner. T. at 236. The company president, John Dow, also testified to the sale of this aircraft. T. at 306. Because of the anticipated reduction in business, the human resources chief and the president began, in February 2004, to discuss layoffs of employees. T. at 239-40; 306. Ms. Biggio testified that she was involved in the process but Mr. Dow made the final decisions on layoffs. T. at 299-300.

The Complainant had received raises in 2002 and 2003. T. at 128, 179. This appears to be consistent with management's asserted policy of giving raises to lower-level employees, if possible, and foregoing salary increases themselves. T. at 234-235; 309. The Complainant stated that, when he was promoted to his position as Quality Assurance Chief in 2003, the Director of Maintenance told him there was no money for raises at that time, but promised him a raise "in the future."[4] T. at 94-95. The company's memorandum, signed by Ms. Biggio, reflecting the Complainant's promotion to the quality assurance position, does not discuss either a raise or future compensation.[5] TAC-39.

On February 26, 2004, the Complainant sent a memorandum, addressed to the company president with a copy to the human resources director, seeking a 20% pay raise. T. at 95; RX-1. Ms. Biggio testified that the Complainant's request for a raise was a "slap in the face," given the company's financial position. T. at 244. She also stated she was concerned about the effect on morale that a dissatisfied employee would have and stated, because someone was to be laid off anyway: "It made more sense that we picked someone who wasn't happy with the situation." T. at 242-43, 246. When the company President received this memorandum, he told the Complainant that a raise was out of the question and, in addition, informed the Complainant that he might be laid off. T. at 280, 307. The Complainant conceded this conversation occurred. T. at 95-96.

On March 5, 2004, the Complainant was laid off. Ms. Biggio testified that three senior pilots, including the Director of Operations, were also informed that day they were to be laid off.[6] T. at 241. All of the people laid off were offered contract work, including the Complainant. T. at 136-37; 205, 241.

Ms. Biggio testified that the decision to lay off the Complainant was made over the weekend, after he submitted his request for a raise. T. at 245. She testified she was unaware of the Complainant's protected activity. T. at 256, 277. She stated it was clear that someone from maintenance would have to be laid off; noted the Complainant's position as Quality Assurance Chief was not mandated by the FAA; and indicated the former Director of Maintenance, who had retired, was willing to help out on a part-time basis as necessary. T. at 246-47, 259, 278; see also

[4] The Director of Maintenance did not testify on this matter. See T. at 316-335.

[5] The Memorandum is dated December 12, 2003 but reflects the Complainant's promotion was effective on September 15, 2003.

[6] According to Ms. Biggio, the pilots were kept on board for several more weeks, to facilitate moving the plane that had been sold, and because some contract work was available. T. at 241.

T. at 295. The Director of Maintenance was aware of the Complainant's protected activity. T. at 326-330. He did not testify about any role in the Complainant's layoff. According to Ms. Biggio, the Director of Maintenance played no role in that decision, but as a member of management he "knew someone was going," and he did not know the Complainant was to be laid off until the day it took place. T. at 248-49. The company President was aware of the Complainant's protected activity, but stated it played no role in the decision to lay him off. T. at 309. On cross-examination, the President denied ever having a conversation with the Complainant about the protected activity, but acknowledged learning about the activity from the Director of Maintenance.[7] T. at 308-09; 311.

During the administrative investigation of the Complainant's complaint, Ms. Biggio sent a letter to the investigator in which she outlined the company's reasons for the Complainant's termination of employment. She stated: "For the record, Mr. Clark was laid off, as were 3 other employees, partly due to the loss of a major charter aircraft from our fleet. That aircraft contributed a substantial source of revenue for Airborne, Inc. and the loss of that revenue required cutbacks. The management staff was in the process of sorting out how to handle this when Mr. Clark left the attached memo on 2/27/04 [memorandum in which the Complainant requested a raise] in Mr. Dow's and my company mailboxes. **Mr. Clark's termination was the direct result of this memo**." (Emphasis in original). RX-6.

At the hearing, counsel for the Complainant cross-examined Ms. Biggio regarding her letter to the investigator. Ms. Biggio explained that the Complainant's request for a 20% raise, shortly after he had received a raise, led to the question whether the company would ever be able to satisfy him. She stated: "if he's walking around feeling like he's not appreciated and he's not getting what he's worth, it doesn't do him any good to work with us and bring everybody else's morale down, he needs to go someplace where he can get that kind of money….That's the decision process when you're thinking about layoffs." T. at 272

Ms. Biggio also stated: "I said his termination was the direct result of that memo being given to us….we already knew we were going to have [to] let somebody go. That just made the choice easy for us to handle. We had someone who wasn't happy there, it makes it easy when you have to pick somebody to take out." T. at 274. On cross-examination, she again denied any knowledge of the Complainant's protected activity. T. at 274-75.

Discussion

As ALJ Teitler correctly recognized, the Complainant's allegation of a violation of the AIR21 statute is based on the temporal proximity between his protected activity and the adverse employment action. D&O at 9. Complainant's Memorandum of Law at 11-14; 28-39. ALJ Teitler found the Complainant "completely dismisses the evidence of financial difficulty occurring right at the time of his request [for a raise]." D&O at 9. In conclusory fashion, ALJ Teitler concluded the Complainant's "only real support for his argument is temporal proximity"

[7] At the hearing, the President seemed unsure about whether the Complainant reported directly to him, as the Complainant testified and company documents established. T. at 312-313; T. at 29; TAC-39; RX-2.

but found the Complainant's position was "equally matched, if not outweighed, by Respondent's evidence."

The Administrative Review Board has recognized that a retaliatory motive may be inferred when an adverse action closely follows protected activity. Kester v. Carolina Power & Light Co., ARB No. 02-007, 2000-ERA-31, (ARB: Sept. 30, 2003), slip op. at 10. In the instant case, the Complainant's protected activity commenced in mid-February 2004 and he was laid off several weeks later, on March 5, 2004.

Temporal connection alone is not necessarily dispositive, however. Barker v. Ameristar Airways, Inc., ARB No. 05-058; 2004-AIR-012 (Dec. 31, 2007), slip op. at 7. The Board also has indicated that "when the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation becomes less likely because the intervening event also could have caused the adverse action." Keener v. Duke Energy Corp., ARB No. 04-091, 2003-ERA-12 (ARB: July 31, 2006), slip op. at 11. The Board also has noted that "if an intervening event that independently could have caused the adverse action separates the protected activity and the adverse action, the inference of causation is compromised." Clark v. Pace Airlines, Inc., ARB No. 04-150; 2003-AIR-28 (Nov. 30, 2006). Indeed, if an employer has "established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action." Barker, slip. op., at 7.

In his Decision and Order, ALJ Teitler discussed, but did not specifically identify, intervening independent events that could have led to the Complainant's layoff. I find there are at least two events that, singly or in combination, independently led to the Complainant's layoff. These are the company's anticipated loss of the use of an aircraft, which would cause a loss of income; and the Complainant's request for a raise. As set forth above, both Ms. Biggio and Mr. Dow realized the loss of the use of the aircraft would likely require layoffs of several employees. Ms. Biggio testified that the Complainant's request for a raise, which she felt to be unwarranted based on the Complainant's recent receipt of two raises, was a "slap in the face." I find that, in effect, the Complainant's action in requesting a raise made it easy for the company to choose him to be laid off; management knew it could not satisfy his desire for more money, and therefore the company leaders could rationalize their decision to target him for a layoff by concluding that, if he continued as an employee, he would not be happy anyway.[8]

ALJ Teitler's Decision and Order did not address the credibility of the various witnesses. I did not observe any of the testimony, and so I cannot make any determinations regarding credibility based on observation. I have carefully reviewed the entire record, including the documentary evidence. Based on the written record, I cannot make any determination as to whether any witness was or was not credible, with regard to testimony pertaining to the Complainant's protected activity or his layoff. My conclusions, therefore, are based on the written record alone. Although I have considered that all of the witnesses may have had some

[8] In retrospect at least, the Complainant seems to have acknowledged that requesting a raise hurt his position in the company. See RX-7 (e-mail to Ms. Biggio).

motive to lie, I could not discern any intentional falsification, based on my examination of testimony and the documentary record.[9]

The Director of Maintenance certainly was aware of the Complainant's protected activity, but there is no evidence he played any role in the decision to lay off the Complainant. Ms. Biggio played a major role in determining which employees were subject to layoffs, but she denied that she knew anything about the Complainant's protected activity, and there is no evidence contradicting her testimony. Mr. Dow, who made the ultimate decisions regarding layoffs, also knew of the Complainant's protected activity. Mr. Dow admitted he told the Complainant, after the Complainant submitted his request for a raise, that his job was in jeopardy. This conversation took place after the Complainant submitted his first two "protected activity" memorandums. However, there is no allegation that Mr. Dow mentioned the Complainant's protected activity in the course of this conversation.

I find the timing of this conversation between the Complainant and the company President is critical, and indicates a lack of nexus between the Complainant's protected activity and his layoff. The conversation took place at least a week after the second of the Complainant's three "protected activity" memorandums, and almost immediately after Mr. Dow was made aware of the Complainant's request for a raise. There is no evidence that the company President mentioned the protected activity when he told the Complainant his job was in jeopardy. Had the Complainant's protected activity been a factor in his layoff, it is likely the President would have raised it in this conversation.

The Complainant established a prima facie case by asserting the temporal proximity between his protected activity and the adverse action. 29 C.F.R. § 1979.104(b). However, there is no other evidence to establish any nexus between his protected activity and his layoff.[10] In addition, as summarized in ALJ Teitler's Decision and Order and above, the Employer has established that at least two independent events, the drop in income related to the anticipated loss of an aircraft, and the Complainant's request for a raise, were factors that led directly to the adverse action. D& O at 8-9.

Based on the evidence before me, I find that the company's precarious financial position precipitated multiple layoffs on March 5, 2004. This is consistent with ALJ Teitler's observations regarding the Employer's "financial difficulty." D&O at 9. I also find the Complainant's action in requesting a significant raise, at the very time multiple layoffs were being considered, was a direct cause of his layoff.

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[9] I have considered that the Complainant's FAA certification was suspended in 1990 because he failed to conduct a repair in accordance with FAA requirements. See T. at 24-26. However, that event was remote in time, and so I do not consider it as calling his credibility into question.

[10] In his Memorandum of Law, the Complainant has suggested the Complainant's protected activity might motivate the Employer to terminate his employment, because the Employer, who had an excellent record of compliance with FAA requirements, would be embarrassed if it had to "self-report" overdue maintenance on an aircraft to the FAA. However, the Complainant provides no specific evidence to support this assertion. See Memorandum of Law at 25-26.

Two additional facts also indicate the Complainant's layoff was not related in any way to his protected activity, but instead was based on the company's financial problems. First, as the Complainant himself conceded, the Employer's Director of Maintenance offered him contract work almost immediately upon laying him off.[11] An offer of contract work suggests the Employer could not justify the expense of retaining the Complainant as an employee, but valued his work and, as circumstances permitted, would like to use his skills. As noted above, the Director of Maintenance was the addressee for all of the Complainant's "protected activity" memorandums and thus was well aware of the protected activity. If the protected activity played a role in the Complainant's layoff, it would be highly unlikely that the Director of Maintenance would offer him the opportunity for future work on the Employer's aircraft.

Second, at the same time the Complainant was laid off, the Employer also informed several pilots they would also be laid off. I find it extremely unlikely the Employer, an air carrier, would cripple its own ability to operate by laying off pilots, unless its financial situation left it no alternative.

Conclusion

Based on the foregoing, therefore, I find the Complainant is unable to establish, by a preponderance of evidence, that his protected activity was a contributing factor in his layoff from the Employer. In this regard, I find that independent events which, in themselves, could have caused the adverse action, negate the inference of a causal connection between the protected activity and the adverse action. See Barker v. Ameristar Airways, Inc., ARB No. 05-058; 2004-AIR-012 (Dec. 31, 2007), slip op. at 7.

Because I found that the Complainant has not established that his protected activity was a contributing factor in his adverse action, it is unnecessary for me to make any determination regarding the Employer's motive. However, as instructed by the Board in its Order of Remand, I will explain briefly the factors that led the Employer to take adverse action against the Complainant.

In sum, the Complainant's layoff was one of several layoffs prompted by the Employer's financial instability, was necessitated by circumstances unforeseen by the Employer as recently as December 2003 but established in the record, and was precipitated by the Complainant's request for an excessive raise. The evidence clearly establishes that, in early 2004, the Employer's financial situation was even more precarious than the company President, Mr. Dow, had discussed in his December 2003 letter to the Employees. The evidence shows the company's difficult situation was caused, in large part, by a specific matter: the imminent loss of revenue related to the loss of an aircraft from its "stable" of aircraft available for charter. The evidence also establishes that the employer was considering layoffs when the Complainant requested a large raise. The evidence of record shows that Ms. Biggio, who played a principal

[11] In his brief, the Complainant suggests this action is a cover-up to get the Complainant back into the Employer's control, so the Complainant will not have an incentive to report the Employer to the FAA. See Memorandum of Law at 39. I find no evidence to support the Complainant's contention.

role in determining which individuals were to be laid off, resented the Complainant's request for a raise. In addition, the evidence indicates the Employer was planning to bring back its retired Director of Maintenance to fill the Complainant's quality assurance role on a part-time basis, thereby cutting the company's costs.[12]

Based on the foregoing, therefore, I find the Employer has established, by clear and convincing evidence, that it would have taken the same adverse action against the Complainant, even in the absence of the protected activity. Notwithstanding ALJ Teitler's application of the improper standard, I find that ALJ Teitler correctly determined that the Complainant has failed to establish a violation of the law. I also find, therefore, that ALJ Teitler correctly determined the Complainant's request for relief should be Denied.

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ADELE H. ODEGARD
Administrative Law Judge

Cherry Hill, New Jersey

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At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).

[12] Clearly, the Complainant, who had just requested a 20% raise, would not have been satisfied with part-time work.